

## REMARKS/ARGUMENTS

Claims 1, 5, 8, 11-22, and 36 are pending in this application. Claims 1, 5, 8, 11-22, and 36 stand rejected. The issues raised in the final Office Action of December 1, 2009 are as follows: Claims 1, 5, 8, 11-22, and 36 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 6,291,533 to Fleischner (hereinafter Fleischner) in view of An Outstanding Food Source of Vitamin C, The Lancet, Vol. 320 Issue 833, p. 873 to Brand et al. (hereinafter Brand) and further in view of U.S. Patent Publication No. 2002/0192314 to Cho et al. (hereinafter Cho).

The combination simply fails to disclose each and every limitation of the present invention and even if it were disclosed there is nothing in the combination of references to motivate the skilled artisan to look to the references to cure the deficiencies in the reference.

The combination fails to teach an antioxidant composition having a flavonoid selected from the group consisting of a flavone, a flavonol, an isoflavone, an isoflavonol, an analogue thereof, a pharmaceutically acceptable salt thereof, and mixtures thereof; and a mixture of at least two forms of vitamin E selected from the group consisting of alpha, beta, delta, epsilon, gamma, zeta, eta, xi1, xi2, and sigma tocopherols, and alpha, beta, delta and gamma tocotrienols, and derivatives thereof; bush plum pulp and skin comprising 5% vitamin C; green tea extract comprising 35-95% polyphenols; and grape skin extract comprising 30-82% polyphenols; wherein the flavonoid and mixture of vitamin E forms are primary ingredients and the primary ingredients are present in the composition in an amount of from 30% to 85% by weight; wherein the bush plum pulp and skin, the green tea extract, and the grape skin extract are secondary ingredients and the secondary ingredients are present in the composition in an amount of from 15% to 70% by weight; wherein the flavonoid and the mixture of vitamin E forms are present in the composition in a weight ratio of from 40/60 to 90/10 percent; and wherein the grape skin extract and the green tea extract are present in the composition in a weight ratio of from 60/40 to 80/20 percent. The Examiner is directed to Figure 2 of the Application. In

Figure 2 and the explanation thereof, synergy is observed most readily when quercetin is provided at between 40 and 90%, wherein synergism is observed above the line. The combination fails to teach a flavonoid selected from the group consisting of a flavone, a flavonol, an isoflavone, an isoflavonol, an analogue thereof and fails to teach a flavonoid (e.g., quercetin) between 40 and 90%, with a synergism observed.

In contrast, Fleischner may disclose a composition of matter intended to supplement the diet, however that composition merely disclose the following ingredients: Vitamin K, ginseng root, Green tea leaf, Hawthorn berry, Pancreatin, Slippery elm Bark, Linden flower, Sarsapilla root, Peppermint leaf, Gingae root, Fenugreek seed, Parsley leaf, Mulberry fruit, Hops strobile, Cayenne Pepper, licorice root, Dandelion root, Quercetin dihydrate, and Bladderwrack kelp and is labeled for use by humans having at least one specific antigen blood type, as defined by blood antigen specificity. The addition of Brand and Cho do not cure these deficiencies and even if they did, there is no motivation to combine the references.

The combination fails to teach the specific combination of ingredients and fails to disclose any synergism effect and fails to disclose any concentration ranges. As such the combination cannot render the present invention obvious. When determining whether a claim is obvious, an examiner must make “a searching comparison of the claimed invention – *including all its limitations* – with the teaching of the prior art.” *In re Ochiai*, 71 F.3d 1565, 1572 (Fed. Cir. 1995) (emphasis added). Thus, “obviousness requires a suggestion of all limitations in a claim.” *CFMT, Inc. v. Yieldup Intern. Corp.*, 349 F.3d 1333, 1342 (Fed. Cir. 2003) (citing *In re Royka*, 490 F.2d 981, 985 (CCPA 1974)). Moreover, as the Supreme Court recently stated, “*there must be some articulated reasoning* with some rational underpinning to support the legal conclusion of obviousness.” *KSR Int’l v. Teleflex Inc.*, 127 S. Ct. 1727, 1741 (2007) (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (emphasis added)).

Nothing in the combination indicates that this is the case or that would motivate the skilled artisan to select the additional components in claim 1 out of thousands of

possible options. Using the specification of the present invention the Office Action finds the present invention out of thousands of “metaphorical darts” to piece together the claimed invention. Absent the present specification, there is no motivation to combine the components to develop the present invention or to provide the surprising synergistic results found by the present inventors. There is nothing in the combination that would have provided any indication to select the instant ingredients. In the recent decision of *In re Kubin*, 561 F.3d 1351 (Fed. Cir. 2009), the Federal Circuit explained that it is improper to build a rejection for obviousness by “merely throw[ing] metaphorical darts at a board filled with combinatorial prior art possibilities, courts should not succumb to hindsight claims of obviousness.” Therefore, the prima facie case for obviousness fails based on the combination of references.

Accordingly, claims 1, 5, 8, 11-22 and 36 are not rendered obvious by Fleischner, Brand and Cho, or any combination thereof. Applicants respectfully request the Examiner withdraw the rejection under 35 U.S.C. § 103(a).

## CONCLUSION

In light of the remarks and arguments presented above, Applicants respectfully submit that the claims in the Application are in condition for allowance. Claims 1, 5, 8, 11-22, and 36 have been allowed. Favorable consideration and allowance of the pending claims 1, 5, 8, 11-22, and 36 are therefore respectfully requested.

In view of the above, Applicant believes the pending Application is in condition for allowance. Applicant believes this paper is being filed with all required fees. However, if any additional fee is due, including those for an extension of time please charge any fees required or credit any overpayment to Chalker Flores, LLP's Deposit Account No. 50-4863 during the pendency of this Application pursuant to 37 CFR 1.16 through 1.21 inclusive, and any other section in Title 37 of the Code of Federal Regulations that may regulate fees. If an extension of time is required with this response but is not included, Applicants hereby petition for a Request for Extension of Time under 37 CFR 1.136(a).

If the Examiner has any questions or comments, or if further clarification is required, it is requested that the Examiner contact the undersigned at the telephone number listed below.

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Respectfully submitted,  
CHALKER FLORES, LLP



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